90-700

No. _____

IN THE

Supreme Court of the United States

October Term, 1990

S & H CONTRACTORS, INC.,
Petitioner,

vs.

A. J. TAFT COAL COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DOES THE APPLICATION OF ALABAMA'S FORUM CLOSING STATUTES TO THE BUSINESS ACTIVITIES OF PETITIONER CONSISTING OF THE ASSEMBLY OF A MACHINE PURCHASED IN THE COURSE OF INTERSTATE COMMERCE VIOLATE THE FEDERAL COMMERCE CLAUSE?

II. WHETHER THE DECISION OF THE COURT OF APPEALS THAT PETITIONER HAS WAIVED ITS RIGHT TO ARBITRATE CONTRAVENES THE FEDERAL ARBITRATION ACT.

PARTIES TO THE PROCEEDING

Parties:

S & H Contractors, Inc.
A. J. Taft Coal Company, Inc.

Affiliated or Related Parties:

O'Rourke Industries, Inc., an Ohio corporation (parent of S & H Contractors, Inc.);
Cordova Trucking Company, Inc. (subsidiary of A. J. Taft Coal Co., Inc.)

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OPINIONS BELOW

The order of the United States Court of Appeals, Eleventh Circuit, affirming decisions of the U. S. District Courts for the Northern District of Alabama and the Northern District of Georgia which refused to allow Petitioner to enforce its contract rights because of Alabama's forum closing statute, reported at 906 F.2d 1507 (11th Cir. 1990).

JURISDICTION

The decision of the United States Court of Appeals, Eleventh Circuit, was entered on July 30, 1990. (Appendix A) Petitioner has ninety days to file its Petition for Writ of Certiorari with this Court. 28 U.S.C. § 2101(c). Therefore this Petition is timely filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The first question presented is whether the

application of Alabama's forum closing statute to the business activities of Petitioner conducted within the State of Alabama violates Petitioner's constitutional rights under the Commerce Clause. The second question presented is whether the Court of Appeals erred in concluding that Petitioner had waived its right to arbitrate and whether its decision in this regard contravenes the Federal Arbitration Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Congress shall have Power . . .

> [3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.

U. S. C. A. Const. Art. 1, § 8, Cl.3.

Transacting business without certificate of authority.

> (a) All contracts or agreements made or entered into in this state by foreign corporations which have not obtained a certificate of authority to transact business in this state shall be held void at the action of such foreign corporation or any person claiming through or under such foreign corporation by virtue of said void contract or agreement; but nothing in this section shall abrogate the equitable rule that he who seeks equity must do equity; provided, that the failure of a foreign corporation to obtain a certificate of authority shall not impair the validity of any contract or agreement heretofore or hereafter entered into and consisting of a mortgage upon real property or an interest in real property in this state, and the note secured thereby, where the mortgage is insured by the Federal Housing Administration or guaranteed by the Veterans Administration, if said foreign corporation shall have thereafter obtained a certificate of authority. In all actions against such foreign corporation, or against any person claiming under such foreign corporation by virtue of such void contract, the foreign corporation or such person claiming under it shall be held to be estopped from setting up the fact that the contract or agreement was so made in violation of law. In all actions against foreign corporations which have not obtained a certificate of authority, the summons or other process may be served upon the officer, agent or employee of the foreign corporation who acted for or represented such foreign corporation in making the contract or agreement sued upon.

Alabama Code § 10-2A-247

Foreign corporations doing business in state.

> No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law, provide for the payment to the state of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax.

Constitution of Alabama of 1901, Article XII, § 232.

When contract void; qualification by foreign corporation to do business in state.

> All contracts made in this state by any foreign corporation which has not first complied with the provisions of sections 40-14-1 through 40-14-3 shall, at the option of the other party to the contract, be wholly void at the action of such foreign corporation or any person claiming through or under such foreign corporation by virtue of such contract, unless said contract, heretofore or hereafter executed, consists of a mortgage upon real property or an interest in real property in this state, and the note secured thereby, where the mortgage is insured by the federal housing administration or guaranteed by the veterans administration, and unless said foreign corporation shall have thereafter qualified to do business in this state. Before so qualifying, such foreign corporation shall be required to pay all qualification fees or admission taxes required by sections 40-14-1 through 40-14-3 for all years or parts of years which it transacted business in this state, together with such interest and penalties thereon as may be assessed in accordance with law. (Acts 1935, No. 194, p. 256; Code 1940, T.51, § 342; Acts 1970, Ex. Sess., No. 34, p. 2657.)

Alabama Code § 40-14-4.

STATEMENT OF THE CASE

S & H Contractors, Inc. ("S&H"), a Kentucky corporation, filed suit against A. J. Taft Coal Company, Inc. ("Taft"), an Alabama corporation, on March 12, 1986, in the Northern District of Alabama to recover amounts due under a contract for the erection of a coal mining dragline to be performed within the State of Alabama. Taft filed a motion to dismiss on the basis that S&H had failed to qualify to do business in Alabama as required under *Ala. Code* §§ 40-14-4, 10-2A-247, and Article XII, Section 232 of the Alabama Constitution. The court entered an order dismissing the suit on December 12, 1986, and an appeal was taken to the Eleventh Circuit Court of Appeals.

On November 17, 1986, S&H filed a demand for arbitration with the American Arbitration Association in accordance with an arbitration clause in the contract. Taft filed an action in the Northern District of Georgia seeking to enjoin the arbitration proceedings which resulted in an order declaring the underlying contract void and enjoining arbitration. S&H appealed and the actions were consolidated.

Jurisdiction vested in the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1291. On July 30, 1990, the Court of Appeals, per Chief Justice Tjoflat, held that the transaction was intrastate in character and therefore the application of Alabama's forum closing statute was not unconstitutional. In a lengthy dissenting opinion, Justice Clark found that the transaction involved interstate commerce and the application of the forum closing statute was therefore unconstitutional. The majority further held that S&H had waived its right to arbitrate the dispute.

Petitioner now prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

I. *The Application of Alabama's Forum Closing Statute Violates Petitioner's Constitutional Rights Under the Commerce Clause.*

i. The Court of Appeals has misconstrued the Federal Commerce Clause resulting in the denial of this important protection to the Petitioner.

At issue is the application of the harshest forum closing statute among the United States — a contract made or to be performed in Alabama by an unqualified foreign corporation is void and cannot be en-forced in Alabama or elsewhere, and the unwary corporation cannot be saved by subsequent compliance. S&H has been de-nied the right to collect the remaining balance owed on a one million dollar contract for the assembly of machinery purchased in course of interstate commerce, a substantial amount of which is not seriously disputed by Taft.

Forum closing statutes were last reviewed by this Court in 1974 in *Allenberg Cotton v. Pittman,* 419 U.S. 20 (1974). Other decisions considering the issue include *Eli Lilly & Co. v. Sav-On-Drugs, Inc.,* 366 U.S. 276 (1961); *York Mfg. Co. v. Colley,* 247 U.S. 21 (1918); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921); *Union Brokerage Co. v. Jensen,* 322 U.S. 202 (1943). These decisions establish that forum closing laws are unconstitutional where interstate commerce is involved.

The question in each of these decisions is whether interstate commerce exists to the extent that it is protected by the Commerce Clause. The Eleventh Circuit misconstrues these decisions and adopts factors which, in their application, have deprived the Petitioner of its important constitutional rights. Equally as important is that interstate commercial activity and competition in this Circuit and elsewhere will be impaired because of the restrictiveness of the Eleventh Circuit's decision and the uncertainty as to its future application.

The Eleventh Circuit "canvasses" the Supreme Court decisions and extracts two factors: (a) the premanence and scope of the relationships between the foreign corporation and the state and (b) whether the intrastate transaction is an essential element of interstate commerce. It then reviews the facts of this case:

Taft, an Alabama corporation, purchased a nine million dollar dragline from a Wisconsin Corporation. S&H was recommended to Taft by the manufacturer and was given the assembly contract. The dragline is an immense piece of equipment designed for coal mining; its assembly, performed in Alabama, was an exceedingly complex operation requiring 275 days, 62,000 man hours, costing approximately $1,000,000, requiring the constant supervision of the manufacturer's representatives and requiring the entry into this state of out of state employees of the manufacturer and S&H to complete the erection process. A dispute arose and S&H was not paid the amount it claims is due; Taft defends on the basis of Alabama's forum closing statute.

The Eleventh Circuit first holds that the Petitioner's relations with Alabama are "substantial and relatively permanent". Second, the court finds that the contract was not an "essential element of an interstate transaction."

The result of the Court of Appeals decision is wrong because the Court did not apply the appropriate tests; leaving this decision in place will allow the states to have a greater reach over the activities of interstate commerce and could substantially restrict the rights of foreign corporations to engage in commercial activities.

The Supreme Court decisions do not require foreign corporations to meet such a stringent test which requires a showing that the transaction is an "essential" element of interstate commerce. In *Allenberg Cotton Co.*, the court, relying on *Dahnke-Walker,* analyzed the transaction to determine if it "was in fact 'a part of interstate commerce' ". In *York Mfg. Co.*, following the guiding principles set forth in *McCulloch v. Maryland,* 4 Wheat. 316, 4 L.ed. 579 (1918), the court determined whether the transaction was "relevant and appropriate to the interstate sale." In *Eli Lilly,* the court considered whether the foreign corporation was "suing upon a contract entirely separable from any particular interstate sale." Any test which can reasonably be drawn from these decisions will be demonstrably broader and grant greater constitutional protection than the "essential element" test adopted by the Eleventh Circuit.

Similarly, the Supreme Court's decisions which discuss the localization of the business activities address factors and set

forth tests which are substantially different and much broader than the "substantial relations and relatively permanent" tests espoused by the Eleventh Circuit. In *Eli Lilly,* the divided court in a five-four opinion, determined that Eli Lilly's activities consisting of opening an office with eighteen permanent employees and participating in inducing intrastate sales was intrastate commerce which was subject to state regulation. The court in *Allenberg Cotton Co.,* in addressing the "localization" question, quoting *Jensen* and *Dahnke-Walker,* considered whether the entry by the foreign corporation in the forum state was "to contribute or to conclude a unitary interstate transaction" and whether the activities involved "a wide variety of dealings with the people in the community." In *Jensen,* the court found sufficient localization where the foreign corporation brokerage business operated continuously in the forum state. The proper construction of these decisions will not support the broad and amorphous tests developed by the Eleventh Circuit.

ii. The lower court has misapplied the facts resulting in the denial of Petitioner's constitutional rights.

Even if this Court decides that the Eleventh Circuit decision fairly and accurately sets forth the applicable constitutional tests, the Eleventh Circuit's application of the facts is erroneous. Its decision turns on two facts: 1) That Taft did not begin seeking a company to assemble the dragline until after it had entered into the purchase contract; and 2) other companies, including an Alabama corporation, could have assembled the dragline.[1]

The Supreme Court decisions teach us that Federal Commerce Clause protection does not hinge upon such niceties. The fact that another Alabama corporation may have had the ability to perform similar work heightens constitutional concerns. This decision allows a state court to interpret facts in a way so as to favor domestic corporations. Also, the fact that the purchaser may not have considered the erection contract until after the purchase contract was entered into is clearly not determinative of whether the erection contract was part of interstate commerce. Instead, the facts important to this inquiry relate to

[1]Petitioner contends that a disputed issue of fact exists as to each of these findings.

the relationship of the assembly to the sale of the machine as evidenced by the terms of the erection contract and the activities engaged in to carry it out.

In *York Mfg. Co.*, virtually identical facts gave rise to a finding that the transaction was protected by the Commerce Clause. The only material difference is that here, the seller of the machine and the assembly contractor are two different entities. There, the court held that the entry of the foreign corporation into the state for the purpose of assembling a complex machine purchased in interstate commerce was protected by the Federal Commerce Clause. Curiously, the majority here notes that if S&H was also the seller, Alabama's forum closing statute would "undoubtedly" not be enforced. *S & H Contractors v. A. J. Taft,* at 1513, N. 4. Therefore, although this Court has held that virtually identical activities were not localized, were relevant and appropriate to an interstate sale, and were therefore constitutionally protected, the Eleventh Circuit has found that because the seller and erector were different, constitutional protection is unavailable.

The propriety of the lower court's application of facts is an important question for this Court's review. All previous decisions of this Court regarding forum closing statutes have involved the question of whether the facts were properly applied to the appropriate constitutional tests. It is this Court's guidance on the proper application of the facts that provides constitutional protection.

iii. The importance of the issues to this Court.

The Court of Appeals decision broadens the reach of state regulatory power. The factors espoused by the Eleventh Circuit are vague and give reviewing courts wide latitude to capture transactions which are clearly subject to federal constitutional protection. Because the factors are not consistent with established precedence nor with the principles of the Commerce Clause, it is important that this Court grant certiorari and correct this error and set forth proper guidelines.

The Court of Appeals decision can be applied by analogy to a multitude of interstate transactions. The trade of any reasonably complex piece of machinery, computer system, or com-

munications network requires involvement of experts in the installation, programming, or on-site design or assembly. These experts are likely to be different from the seller and under the Eleventh Circuit's decision, their entry into any state would be subject to state forum closing laws. In Alabama the unwary will lose their contract price. To defeat the foreign corporation's rights to recover, the domestic party need only show that another Alabama corporation could have done the work and that the foreign corporation's in-state activities were "substantial and relatively permanent" — i.e., that they remained in Alabama long enough to complete the contract. As a nation committed to free enterprise and as one which depends upon the free exchange of ideas, expertise, and workers to remain competitive in the world market, we cannot permit a state to restrict interstate activities in such a broad, far reaching and uncertain manner.

Consideration of this issue is timely. This Court has not visited this subject in sixteen years during which time we have seen substantial growth in interstate commerce. The existing Supreme Court decisions do not give litigants a clear understanding of the applicable constitutional tests. As a result, uncertainties exist as to the rights and obligations of foreign corporations engaging in interstate commercial activities. Such uncertainties lead to a chilling effect on the exercise of rights which would otherwise be protected under the Commerce Clause, unfairly favor domestic corporations, and limit the exchange of expertise and ideas in the marketplace, all of which is contrary to the purposes of the Commerce Clause. This case illustrates how lower courts, left with imprecise constitutional tests, fashion relief which is unnecessarily restrictive and at odds with decisions of this Court and the broad protection of the Commerce Clause.

II. *The Court of Appeals Decision is Not in Accordance With the Federal Arbitration Act.*

The Eleventh Circuit's decision holding that S&H has waived its right to arbitrate is in conflict with the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* The District Court did not reach the question of whether S&H had waived its right to arbitration.

Indeed, the arbitration panel, before the stay was issued, held that S&H had not waived its right to arbitrate. (Appendix D) The Eleventh Circuit ruled on the issue notwithstanding the lack of a developed record.

The decision is wrong because it is at odds with the Federal Arbitration Act. This Act, and the decisions interpreting it, are driven by the strong policy in favor of arbitration. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). There, this Court expressly held that doubts as to whether an arbitration right has been waived are to be resolved in favor of arbitration.

S&H filed suit to enforce its contract claim. Taft filed its motion to dismiss based on the forum closing statute. Discovery and all other aspects of the case proceeded *only* as it relates to the question of the application of the forum closing statute; no answer was filed by the defendants, no discovery directed to the merits was undertaken, and no hearings were held on any subject other than the forum closing statute.

Moreover, the trial courts did not address waiver and the arbitration panel which did found no waiver. Other circuit courts considering the question of waiver have insisted upon a more persuasive record supporting waiver in order to overcome the strong presumption in favor of arbitration. *See e.g., Valero Refining, Inc. v. M/T Lauberhorn*, 813 F.2d 60 (5th Cir. 1987) (In a maritime setting, participating in discovery will not necessarily constitute a waiver); *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473 (9th Cir. 1984) (Participation in limited discovery does not constitute a waiver.)

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals, Eleventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

S & H CONTRACTORS, INC., a corporation, Plaintiff-Appellant,

v.

A.J. TAFT COAL COMPANY, INC., a corporation, Defendant-Appellee.

A.J. TAFT COAL COMPANY, INC., Plaintiff-Appellee,

v.

S & H CONTRACTORS, INC., Defendant-Appellant.

Nos. 87-7028, 88-8829.

United States Court of Appeals, Eleventh Circuit

July 30, 1990.

Foreign corporation brought suit against Alabama corporation for alleged breach of contract. The United States District Court for the Northern District of Alabama, No. CV-86-P-0468-S, Sam C. Pointer, Jr., Chief Judge, granted summary judgment in favor of Alabama corporation. Foreign corporation appealed, but appeal was stayed pending arbitration of parties' dispute. Alabama corporation thereafter filed complaint in the United States District Court for the Northern District of Georgia requesting that court to enjoin arbitration proceedings. The Court, No. 1:88-cv-436-MHS, Marvin H. Shoob, J., enjoined arbitration proceedings, and foreign corporation appealed. Appeals were consolidated. The Court of Appeals, Tjoflat, Chief Judge, held that: (1) foreign corporation was doing intrastate business in Alabama, within meaning of Alabama forum-closing statute; (2) transaction was sufficiently localized to permit enforcement of Alabama's forum-closing statute without violating commerce clause; and (3) foreign corporation waived its right to arbitrate.

Affirmed.

Clark, Circuit Judge, filed dissenting opinion.

1. Federal Courts

In diversity cases, Court of Appeals applies two-step analysis to determine whether Alabama's forum-closing statute bars foreign corporation's contract claim; Court first determines whether Alabama courts, applying the statute, would refuse foreign corporation's request to enforce contract, and if they would, Court must determine whether enforcing statute would unduly burden interstate commerce. Ala. Const. § 232; Ala. Code 1975, §10-2A-247(a); U.S.C.A. Const. Art. 1, § 8, cl. 3.

2. Corporations

Alabama courts will not enforce foreign corporation's contract if, at time contract was entered into, foreign corporation had not been qualified by Secretary of State to do business in Alabama, and foreign corporation was doing business of intrastate nature in Alabama pursuant to contract. Ala. Const. § 232; Ala. Code 1975, § 10-2A-247(a).

3. Corporations

Foreign corporation did business in Alabama, and Alabama's forum-closing statute applied to bar corporation's contract claim, where contract called solely for assembly of machinery in Alabama. Ala. Code 1975, § 10-2A-247.

4. Commerce

Corporations

Transaction wherein foreign corporation contracted to assemble in Alabama, machinery sold in interstate commerce, was sufficiently localized to permit enforcement of Alabama's forum-closing statute without violating commerce clause; foreign corporation's relations with Alabama were substantial and relatively permanent, and transaction was not an essential or necessary element of interstate transaction. Ala. Code 1975, § 10-2A-247; U.S.C.A. Const. Art. 1, § 8, cl. 3.

5. Arbitration

Party has waived its right to arbitration if, under totality of circumstances, party has acted inconsistently with arbitration right and, in so doing, has in some way prejudiced the other

party; in determining whether other party has been prejudiced, court may consider length of delay in demanding arbitration and expenses incurred by that party from participating in litigation process.

6. Arbitration

Foreign corporation waived its right to arbitration under contract with Alabama corporation, by waiting eight months from time it filed its complaint to time it demanded arbitration, during which time Alabama corporation filed two motions and foreign corporation took five depositions.

Appeal from the United States District Court for the Northern District of Alabama.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, Chief Judge, CLARK, Circuit Judge, and SMITH*, Senior Circuit Judge.

TJOFLAT, Chief Judge:

S & H Contractors (S & H) appeals judgments entered, in two separate cases, by the District Court for the Northern District of Alabama and by the District Court for the Northern District of Georgia. The district court, in the first case, granted summary judgment in favor of A.J. Taft Coal Company (Taft) in a suit by S & H against Taft on a contract between those two parties. S & H appealed that judgment, but the appeal was stayed pending arbitration of the parties' dispute. The district court, in the second case, enjoined the arbitration proceedings, and S & H again appealed. The separate appeals were consolidated. We affirm both judgments.

I.

On May 23, 1984, Taft, an Alabama corporation, entered into a contract with Bucyrus-Erie Company, a Delaware corporation with its principal place of business in Wisconsin,

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* Honorable Edward S. Smith, Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

for the purchase of a disassembled "walking dragline" — a large excavating machine used in the coal mining industry. Bucyrus-Erie agreed to transport the dragline parts to Alabama and to send several of its engineers to the assembly site to supervise the machine's assembly, but Taft remained primarily responsible for assembling the dragline.

After entering into the contract with Bucyrus-Erie for the purchase of the dragline, Taft decided to hire a contractor to assemble the dragline and entered into negotiations with S & H, a Kentucky corporation with its primary place of business in Kentucky. The negotiations culminated in a contract signed on December 6, 1984,[1] under which S & H agreed to assemble the dragline under the supervision of the Bucyrus-Erie engineers. At the time of the contract's formation, S & H had not been qualified by Alabama's secretary of state to do business in Alabama. In fact, S & H did not qualify to do business in Alabama until February 3, 1986.

On March 12, 1986, S & H filed a complaint in the United States District Court for the Northern District of Alabama, alleging *inter alia* that it had substantially performed its responsibilities under the contract and that Taft had breached the contract by failing to pay the amounts due for substantial performance and for extra work done by S & H. On March 31, 1986, Taft moved to dismiss the complaint on the ground that, because S & H failed to qualify to do business in Alabama before entering into its contract with Taft, the contract was unenforceable under Alabama's forum-closing laws. *See* Ala. Const. art. XII, § 232; Ala. Code § 10-2A-247 (1975). The district court took no action on the motion to dismiss for several months, and, during that period, S & H engaged in fairly extensive pretrial discovery. Then, on November 14, 1986, S & H demanded that Taft arbitrate the dispute under the auspices of The American Arbitration Association as required by an arbitration clause in the contract. On December 12, 1986, the district court converted Taft's motion to dismiss to a motion for summary judgment and granted the motion, holding that

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[1] There is some dispute over whether the contract was entered into in Alabama or Kentucky, but that dispute is irrelevant to our disposition of these appeals.

S & H's failure to qualify to do business made its contract with Taft unenforceable under Alabama's forum-closing laws. The court therefore dismissed S & H's complaint with prejudice. S & H appealed, but the appeal (No. 87-7028) was stayed pending the outcome of arbitration.

On February 3, 1987, Taft filed suit in the Northern District of Alabama to enjoin arbitration proceedings, arguing that the court had declared the entire contract void in its order dismissing S & H's suit on the contract. On April 17, 1987, the court granted Taft's prayer for relief and enjoined arbitration proceedings in Alabama. The court reasoned that, if the arbitration proceedings were conducted in Alabama, a federal district court in Alabama might be required to enforce the arbitrator's award and, in effect, to enforce the underlying contract.[2] In the court's view, such a result would undermine Alabama's public policy as expressed in its forum-closing laws.

S & H then petitioned the American Arbitration Association to transfer the arbitration proceedings to Atlanta, and the Association granted the petition. On March 29, 1988, Taft filed a complaint in the United States District Court for the Northern District of Georgia, requesting that court to enjoin the arbitration proceedings. Taft argued that the proceedings should be enjoined for two reasons: first, according to Taft, its contract with S & H was void for all purposes, and S & H could not demand arbitration under a void contract. Second, Taft argued that, by bringing suit on the contract in federal district court before demanding arbitration, S & H waived its right to demand arbitration. Taft then moved for summary judgment. The district court granted the motion and enjoined the arbitration proceedings. The court held that the contract was both unenforceable and void and thus the parties never agreed to submit to arbitration. The court declined to address the waiver issue. S & H again appealed, and that appeal (No. 88-8829) was consolidated with S & H's earlier appeal from the district

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[2] The court rejected Taft's characterization of its prior ruling as declaring the contract void for all purposes. Rather, the court explained that it had held the contract to be unenforceable in Alabama courts by the foreign corporation.

court's dismissal of the contract action. We address each appeal in order.

II. S & H's Suit on the Contract

Alabama's constitution provides that, "[n]o foreign corporation shall do any business in this state without . . . filing with the secretary of state a certified copy of its articles of incorporation or association." Ala. Const. art. XII, § 232. This provision is enforced through the operation of Alabama's forum-closing statute, which states that

> [a]ll contracts or agreements made or entered into in this state by foreign corporations which have not obtained a certificate of authority to transact business in this state shall be held void at the action of such foreign corporation or any person claiming through or under such foreign corporation by virtue of said void contract or agreement; but nothing in this section shall abrogate the equitable rule that he who seeks equity must do equity . . .

Ala. Code § 10-2A-247(a) (1975).

[1] In diversity cases, we apply a two-step analysis to determine whether Alabama's forum-closing statute bars a foreign corporation's contract claim. First, we determine whether Alabama courts, applying the statute, would refuse the foreign corporation's request to enforce the contract. *See Aim Leasing Corp. v. Helicopter Medical Evacuation, Inc.*, 687 F.2d 354, 357 (11th Cir. 1982). If we conclude that Alabama courts would close their doors to foreign corporation, then we must examine the burden such a closing would place on interstate commerce: we will not enforce the forum-closing statute if its enforcement in a particular case would unduly burden interstate commerce in violation of the federal commerce clause. *Id.* We address the state law and federal law questions in turn and hold that the district court properly refused to enforce S & H's contract with Taft.

A.

[2, 3] Alabama courts will not enforce a foreign corporation's contract if (1) at the time the contract was entered into, the foreign corporation had not been qualified by the secretary of state to do business in Alabama, and (2) the foreign corporation

was doing business of an intrastate nature in Alabama pursuant to the contract. *See Sanwa Business Credit Corp. v. G.B. "Boots" Smith Corp.*, 548 So.2d 1336, 1337 (Ala. 1989). S & H does not dispute that it had failed to qualify to do business in Alabama at the time it entered into the contract with Taft. It does argue, however, that the district court erred in holding that S & H was doing intrastate business in Alabama. We consider the district court's holding on this issue to be sound.

The Alabama Supreme Court has held that a foreign corporation does business in Alabama, within the meaning of the forum-closing provisions, when the contract at issue must be performed by the foreign corporation in Alabama and the contract does not involve interstate commerce. *See Sanjay, Inc. v. Duncan Constr. Co.*, 445 So.2d 876, 880 (Ala. 1983). In other words, the foreign corporation's activities must be " 'intrastate in nature.' " *Sanwa*, 548 So.2d at 1337 (quoting *Johnson v. MPL Leasing Corp.*, 441 So.2d 904, 905 (Ala. 1983)). Thus, Alabama courts generally hold that a foreign corporation's sale and delivery of out-of-state goods is a transaction involving interstate commerce and enforce the contract underlying such a transaction. *See, e.g., Loudonville Milling Co. v. Davis*, 37 So.2d 659, 661 (Ala. 1948).

The contract in this case, however, is not for the sale and delivery of goods; it is solely for the assembly of machinery in Alabama. The contract expressly provides that S & H must "completely erect and deliver [the dragline] to Taft . . . at the place hereinafter called the 'erection site' " in Alabama. We conclude that this contract clearly provides for a transaction of an intrastate nature.

S & H would have us believe that, merely because the sale and delivery of the disassembled dragline was a transaction involving interstate commerce, the erection of the dragline must also be a transaction involving interstate commerce. S & H argues that its construction services were "incidental" to the primary interstate transaction. The Alabama Supreme Court, however, has considered and rejected such an argument. The court has repeatedly held that " 'a foreign corporation doing construction work within a state is held to be doing business in that state and is not exempted from local regulation by the

fact that it brings materials or laborers into the state.' " *Sanwa,* 548 So.2d at 1339 (quoting *Computaflor Co. v. N. L. Blaum Constr. Co.,* 265 So.2d 850, 852 (Ala. 1972)). For example, in *Calvert Iron Works, Inc. v. Algernon Blair, Inc.,* 227 So.2d 424 (Ala. 1969), a foreign corporation contracted to "furnish and erect [in Alabama] certain steel for a specified price." *Id.* at 425. Thus, the contract provided for the sale and delivery of out-of-state goods but also required the foreign corporation to assemble those goods in Alabama. The Alabama Supreme Court held this transaction to be intrastate in nature and refused to enforce the contract. *Id.* at 425-26.

In the present case, because S & H did not contract to supply the out-of-state materials to be assembled, the transaction at issue is even further removed from interstate commerce than the transactions at issue in *Sanwa, Computaflor,* and *Calvert.* We therefore hold that S & H was doing business in Alabama without having been qualified to do so and that Alabama courts would refuse to enforce S & H's contract with Taft.

B.

We now must examine the burden placed on interstate commerce by enforcing Alabama's forum-closing statute in this case. Our analysis of this issue is guided solely by federal constitutional law; therefore, our previous holding that, under state law, this transaction is intrastate in nature, does not affect our analysis of the constitutionality of enforcing the forum-closing statute in this case. The district court failed to address this federal constitutional question, apparently operating under the misconception that the federal commerce clause issue and the state law "doing business" issue are identical. The two inquiries are distinct, but we think, nevertheless, that the district court would have reached the same result had it considered the federal commerce clause question separately.

The transaction at issue has both interstate and intrastate aspects. Indeed, if we were inquiring into the constitutionality of *federal* regulation of this transaction, we would likely hold that the transaction involves "commerce which concerns more states than one," *see Gibbons v. Ogden,* 22 U.S. (9 Wheat.)

1, 194, 6 L.Ed. 23 (1824), and would be properly subject to congressional regulation. When we are faced with *state* regulation of such a transaction, however, we ask a different question: Does the regulation, as applied to the transaction at issue, unduly burden interstate commerce? The Supreme Court has held that a state's forum-closing statute does not unduly burden interstate commerce when the foreign corporation has ' "localized its business' " in the state and when it is not entering the state " 'to contribute to or to conclude a unitary interstate transaction.' " *Allenberg Cotton Co. v. Pittman,* 419 U.S. 20, 32-33, 95 S.Ct. 260, 267, 42 L.Ed.2d 195 (1974) (quoting *Union Brokerage Co. v. Jensen,* 322 U.S. 202, 210, 64 S.Ct. 967, 972, 88 L.Ed. 1227 (1944)).

[4] Although the question of localization calls for an ad hoc inquiry into the facts of each case, we have convassed the Supreme Court's and this court's relevant cases and have distilled two factors that consistently guide the courts' decisions. First, the courts often focus on the permanence and scope of relationships between the foreign corporation and the forum state. *See, e.g., Eli Lilly & Co. v. Sav-on-Drugs, Inc.,* 366 U.S. 276, 280-82, 81 S.Ct. 1316, 1319-20, 6 L.Ed.2d 288 (1961); *Union Brokerage,,* 322 U.S. at 210, 64 S.Ct. at 972; *SAR Mfg. Co. v. Dumas Mfg. Co.,* 526 F.2d 1283, 1284-86 (5th Cir. 1976).[3] Second, the courts frequently ask whether the intrastate transaction is an essential element of an interstate transaction. *See, e.g., Allenberg Cotton Co. v. Pittman,* 419 U.S. 20, 30, 95 S.Ct. 260, 266, 42 L.Ed.2d 195 (1974); *York Mfg. Co. v. Colley,* 247 U.S. 21, 24-26, 38 S.Ct. 430, 431-32, 62 L.Ed. 963 (1918); *Diversacon Indus., Inc., v. National Bank of Commerce,* 629 F.2d 1030, 1033 (5th Cir. 1980). In our view, both factors weigh in favor of holding the transaction at issue here to be sufficiently localized to permit enforcement of Alabama's forum-closing statute without violating the federal commerce clause.

Our analysis of the permanence and scope of S & H's relations with Alabama begins with the Supreme Court's decision in

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[3]In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Eli Lilly, 366 U.S. at 276, 81 S.Ct. at 1316. Eli Lilly sought to enforce a contract in New Jersey against a New Jersey Corporation, but a state court, relying on the state's forum-closing statute, dismissed the complaint. Eli Lilly, an Indiana corporation, was actively engaged in the sale and delivery of goods in interstate commerce but had established a permanent branch office in New Jersey. Eli Lilly leased office space in the state and maintained a staff of approximately eighteen enployees who were in frequent contact with the company's New Jersey customers. *Id.* at 279-81, 81 S.Ct. at 1319. The Supreme Court held that, given this degree of contact with the State of New Jersey, the federal commerce clause would not be violated by enforcement of the state's forum-closing statute against Eli Lilly. *Id.* at 280-282, 81 S.Ct. at 1319-20.

This court reached the same conclusion in *SAR Manufacturing,* 526 F.2d at 1283. In that case, a Texas corporation, prior to the transaction at issue, leased a warehouse in Alabama for the purpose of temporarily storing goods shipped from Texas to the corporation's Alabama customers. The foreign corporation employed several full- and part-time employees at the Alabama warehouse. *Id.* at 1284. All of the corporation's business in Alabama was transacted out of the Alabama warehouse, with the exception of the actual manufacturing of the goods in Texas. This court found the facts of the case to be substantially similar to the facts of *Eli Lilly* and held that enforcement of the Alabama forum-closing statute was constitutional. *Id.* at 1285-86.

While the facts of the case at hand are not identical to the facts of either *Eli Lilly* or *SAR,* we think the facts are similar in many important respects. Although S & H apparently did not maintain a permanent presence in Alabama, the record indicates that assembly of the dragline, with no delays, would require almost one year. Furthermore, S & H has been engaged in similar projects in Alabama on at least four other occasions. To complete the dragline at issue here, S & H sent four or five part-time employees and one full-time employee to the erection site, leased apartments in the area for those employees, transported a substantial amount of equipment to the site, maintained a telephone system in a trailer on the site, and hired

numerous other union employees for the job. In light of these facts, we have no difficulty in finding S & H's relations with Alabama to be substantial and relatively permanent.

We also think that the transaction at issue here was not an essential or necessary element of an interstate transaction. We have compared this case with other cases in which the intrastate transaction was found to be a necessary element of an interstate trawnsaction, and we think those cases are easily distinguishable from the present case. For example, in *York Manufacturing,* 247 U.S. at 21, 38 S.Ct. at 430, the transaction involved an interstate sale and delivery of a disassembled ice machine to be assembled in the forum state under the supervision of the manufacturer/seller's engineer. Apparently, the machine was so complex that the engineer's services were required to assemble the machine poroperly. *Id.* at 22, 38 S.Ct. at 431. The Court held that the forum-closing statute could not be enforced in that case because "the service to be done in [the forum] state as the result of an interstate commerce sale was essentially connected with the subject matter of the sale, that is, might be made to appropriately inhere in the duty of performance." *Id.* at 24, 38 S.Ct. at 431. The Court went on to distinguish those cases in which an "inherently intrastate [transaction] did not lose its essential nature because it formed part of an interstate commerce contract to which it had no *necessary* relation." *Id.* at 26, 38 S.Ct. at 432 (emphasis added).

The Supreme Court returned to the subject in *Allenberg Cotton,* 419 U.S. at 20, 95 S.Ct. at 260. The underlying transaction in *Allenberg* involved a contract for the sale and delivery of cotton. The buyer, a foreign corporation, maintained a warehouse in the forum state and entered into contracts with local cotton farmers. Under the contract, which was a typical "forward" contract, the farmer promised to deliver a certain amount of cotton, grown during the next season, to the foreign corporation's warehouse in the forum state. The foreign corporation then sorted the cotton at the warehouse and sold the cotton to buyers outside the forum state. The Court considered the importance of this type of contract to middlemen, such as the foreign corporation, who needed forward contracts to cover their expenses. *See id.* at 26, 95 S.Ct. at 264. The

Court held that "[d]elivery of the cotton to a warehouse, taken in isolation, is an intrastate transaction. But that delivery is also essential for the completion of the interstate transaction. . . ." *Id.* at 30, 95 S.Ct. at 266. Therefore, the Court refused to enforce the state's forum-closing statute. *Id.* at 34, 95 S.Ct. at 267; *see also Diversacon,* 629 F.2d at 1033 (forum-closing statute not enforced when intrastate transaction is "an integral part of an overall interstate pattern or transaction").

Two key facts distinguish this case from *Allenberg, York,* and *Diversacon.* First, Taft did not even begin seeking a company to assemble the dragline until *after* it had entered into the contract to purchase the dragline from Bucyrus-Erie. Second, other companies, including an Alabama corporation and Taft itself, could have assembled the dragline. We would be ignoring reality if we concluded on these facts that the erection contract constituted a "necessary," "essential," or "integral" part of the interstate sale of the dragline.[4] Indeed, entering into the

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[4]In concluding that this case is controlled by *York,* the dissent fundamentally misreads that case. In *York,* the Court determined whether the state's forum-closing statute could operate to preclude enforcement of the *contract to supervise* construction of the ice machine. The *seller's* contract in *York* was much like the *seller's* contract in this case. The *York* contract provided that the seller would ship the parts and would send an engineer to supervise assembly, but that the buyer would be responsible for providing mechanics to assemble the machine. *See* 247 U.S. at 22, 38 S.Ct. at 431. The Court, however, did not address the enforceability of the mechanics' contract; rather, it considered whether the *seller's contract to provide a supervisor* could be enforced. *Id.* at 22-23, 38 S.Ct. at 431.

In this case, we are not asked to enforce Alabama's forum-closing statute against Bucyrus-Erie in a suit to recover payment for the services of Bucyrus-Erie's engineer. That case would be controlled by *York,* and we would undoubtedly not enforce Alabama's forum-closing statute. What we are asked to do is enforce the forum-closing statute against a party providing *local construction services.* Thus, the question is not, as the dissent maintains, whether assembly of the machine was complex and required supervision, but whether *the service at issue* "was essentially connected with the subject matter of the sale, that is, might be made to appropriately *inhere in the duty of performance.*" *Id.* at 24, 38 S.Ct. at 431. Certainly, Bucyrus-Erie's promise to send an engineer to supervise assembly was so essential to the sale that it could be considered part of Bucyrus-Erie's "duty of performance." In essence, that is what the dissent is arguing — unfortunately, the dissent is arguing about the wrong case. Since we are concerned only about S & H's contract to provide construction services in Alabama, we must ask whether those ser-

erection contract might be better characterized as an afterthought — something that was not a precondition of the interstate sale and that Taft did not have to do in order to utilize the machine.

S & H's relations with Alabama were significant and lengthy; furthermore, the erection contract was not an essential element of an interstate transaction. We therefore hold that S & H's operations were sufficiently localized in Alabama to allow Alabama courts to enforce the forum-closing statute against S & H without offending the federal commerce clause. Thus, we affirm the district court's order dismissing S & H's suit on the contract.[5]

III. Taft's Suit to Enjoin Arbitration

As we note, the District Court for the Northern District of Georgia granted Taft's motion for summary judgment and enjoined arbitration on the ground that the contract between

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vices in Alabama, we must ask whether those services were so "essentially connected" to the *sale* of the dragline parts that they could be considered part of the *seller's* (i.e. Bucyrus-Erie's) "duty of performance." The facts clearly show that S & H's services were not so connected to the sale.

Finally, the dissent seems to imply that if the machine (which has been sold in interstate commerce) is useless unless it is assembled, then assembling the machine is essentially connected to the sale. While this argument has some logical appeal, it completely rejects the teaching of *Browning v. City of Waycross*, 233 U.S. 16, 34 S.Ct. 578, 58 L.Ed. 828 (1914). In *Waycross*, which the *York* Court cited extensively and eventually distinguished, the Court held that the assembly of light poles, which had been shipped in interstate commerce, was a local activity. *Id.* at 22-23, 34 S.Ct. at 580. Obviously, light poles are useless unless assembled. Thus, while a "uselessness" test is appealing because of its easy application, the Supreme Court has indicated that something more than uselessness is needed to show an essential connection to an interstate sale.

[5]In its amended complaint, S & H also sought relief based on a theory of *quantum meruit* and requested the court to establish a lien on the dragline in favor of S & H. We note that S & H's request for relief based on *quantum meruit* might have raised the difficult question of whether such a suit constitutes a suit on the contract within the meaning of the forum-closing statute. *See First Bank v. Wells*, 358 So.2d 435, 437 (Ala. 1978) (forum-closing statute bars only suit on contract, not suits based on "equitable rights long recognized by our jurisprudence"). This question, however, has not been presented on appeal, and we therefore have no occasion to address it.

S & H and Taft was void for all purposes. The court refrained from addressing Taft's argument that S & H, by bringing suit on the contract, waived its right to arbitrate under the contract. We affirm the district court's order enjoining arbitration, but we do it for a different reason. We think that the issue is whether the contract, and hence the arbitration clause, is void for all purposes presents extremely difficult questions of state law that we should avoid if possible. Indeed, in this case, there is no need to resolve these difficult questions of state law since, even if the arbitration clause is enforceable, S & H waived its right to arbitrate. Our determination of whether S & H waived its right to arbitration, as opposed to whether the contract is void under Alabama law, is controlled solely by federal law. *See Huber, Hunt & Nichols, Inc. v. Architectural Stone Co.*, 625 F.2d 22, 25 & n. 8 (5th Cir. 1980); *E. C. Ernst, Inc. v. Manhattan Constr. Co.*, 551 F.2d 1026, 1040 (5th Cir. 1977), *cert. denied sub nom. Providence Hosp. v. Manhattan Constr. Co.*, 434 U.S. 1067, 98 S.Ct. 1246, 55 L.Ed.2d 769 (1978).

[5] We have held that, despite the strong policy in favor of arbitration, *see Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22-23, 103 S.Ct. 927, 940-41, 74 L.Ed.2d 765 (1983), a party may, by its conduct, waive its right to arbitration. *See E. C. Ernst, Inc. v. Manhattan Constr. Co.*, 559 F.2d 268, 269 (5th Cir. 1977). Thus, a party that "[s]ubstantially invok[es] the litigation macninery" prior to demanding arbitration may waive its right to arbitrate. *Id.* A party has waived its right to arbitrate if, "under the totality of the circumstances, the . . . party has acted inconsistently with the arbitration right," *National Found. for Cancer Research v. A. G. Edwards & Sons*, 821 F.2d 772, 774 (D.C. Cir. 1987), and, in so acting, has in some way prejudiced the other party, *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1986). When determining whether the other party has been prejudiced, we may consider the length of delay in demanding arbitration and the expense incurred by that party from participating in the litigation process. *See Frye v. Paine, Webber, Jackson & Curtis, Inc.*, 877 F.2d 396, 399 (5th Cir. 1989), *petition for cert. denied*, ___ U.S. ___, 110 S.Ct. 1318, 108 L.Ed.2d 493 (1990).

[6] In this case, S & H waited eight months from the time it filed its complaint to the time it demanded arbitration. *See Miller Brewing*, 781 F.2d at 497 (plaintiff waited eight months after filing suit in state court to announce intention to arbitrate). During that time, Taft filed two motions — a motion to dismiss and an opposition to S & H's motion for discovery. Additionally, S & H took the depositions of five Taft employees (totalling approximately 430 pages) prior to demanding arbitration. We conclude from these facts that, as a matter of law, Taft was prejudiced by S & H's delay in demanding arbitration and by its invocation of the litigation process. Furthermore, we find that S & H acted inconsistently with its arbitration right. S & H, therefore, has waived its right to arbitrate, and we affirm, on that ground, the district court's order enjoining the arbitration proceedings.

IV.

For the foregoing reasons, we affirm both the judgment of the District Court for the Northern District of Alabama dismissing S & H's suit on the contract and the judgment of the District Court for the Northern District of Georgia enjoining the arbitration proceedings.

AFFIRMED.

CLARK, Circuit Judge, dissenting:

Respectfully, I dissent. The majority opinion incorrectly analyzes the facts when (1) it finds that S & H's work in Alabama was not an essential element of an unitary interstate transaction and (2) it finds that S & H localized its business in Alabama notwithstanding the evidence clearly showing that S & H was there for the sole purpose of the contract in question.

The majority unsuccessfully attempts to distinguish a case whose facts are very similar to those in this case. In *York Mfg. Co. v. Colley*, 247 U.S. 21, 38 S.Ct. 430, 62 L.Ed.963 (1918), York sued a Texas purchaser who refused to pay York's bill, and the Court recited the following:

> At the trial it was shown without dispute that the contract covered an ice plant guaranteed to produce three tons of ice a day, consisting of gas compression pumps, a com-

> pressor, ammonia condensers, freezing tank and cans, evaporating coils, a brine agitator and other machinery and accessories, including apparatus for utilizing exhaust steam for making distilled water for filling the ice cans. These parts of machinery, it was provided, were to be shipped from Pennsylvania to the point of delivery in Texas and were there to be erected and connected. This work, it was stipulated, was to be done under the supervision of an engineer to be sent by the York Manufacturing Company for whose services a fixed per diem charge of $6 was to be paid by the purchasers and who should have the assistance of mechanics furnished by the purchasers, the supervision to include not only the erection but the submitting of the machinery to a practical test in operation before the obligation to finally receive it would arise.
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> * * * * * *
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> Was the particular provision of the contract for the service of an engineer to assemble and erect the machinery in question at the point of destination and to practically test its efficiency before complete delivery relevant and appropriate to the interstate sale of the machinery? When the controversy is thus brought in last analysis to this issue there would seem to be no room for any but an affirmative answer. Generically this must be unless it can be said that an agreement to direct the assembling and supervision of machinery whose intrinsic value largely depends upon its being united and made operative as a whole is not appropriate to its sale. The consequence of such a ruling if made in this case would be particularly emphasized by a consideration of the functions of the machinery composing the plant which was sold, of its complexity, of the necessity of its aggregation and unison with mechanical skill and precision in order that the result of the contract of sale — the ice plant purchased — might come into existence.

247 U.S. at 22, 25, 38 S.Ct. at 431-32.

In referring to the legal standard in this type of case, our predecessor court in *Diversacon* (discussed *infra*) stated the legal test as follows: "Essentially, the [Supreme] Court included in a federal definition of interstate commerce any activity of an interstate nature which was an integral part of an overall interstate pattern or transaction." 629 F.2d 1030, 1033 (5th Cir. 1980) (citations omitted).

FACTS

In the present case, Bucyrus-Erie (Bucyrus), a foreign corporation, contracted with Taft to sell it an unassembled dragline, which because of its huge size, could not be shipped assembled. Bucyrus was not in the business of assembling such large items. The sales contract expressly provided that Bucyrus would furnish A. J. Taft Coal Company (Taft) with a resident engineer to oversee the entire 275-day assembly process. Additionally, Bucyrus agreed to provide follow-up service of six visits at three-month intervals after completion of assembly to assure the machine was functioning properly. Finally, the contract between S & H Contractors (S & H) and Taft expressly incorporates provisions in the Bucyrus/Taft contract which pertain to assembly. The circumstances surrounding the formation of the sales and subsequent assembly contracts demonstrate that Taft relied heavily on Bucyrus in selecting a suitable assembly contractor. Taft requested and received from Bucyrus its list of assembly contractors who were capable of assembling this type of equipment. S & H was one of the contractors on the list and one which Bucyrus specifically recommended to Taft. Bucyrus and S & H had worked together on assembly projects in the past. Several former Bucyrus employees were employed by S & H which, according to the deposition testimony, satisfied Taft that S & H had the necessary expertise to assemble this model dragline.

The record shows that assembly of this machine involved an extremely complex operation. The contract provision to provide a supervising engineer indicates that Taft and Bucyrus considered it sufficiently complex to require Bucyrus' expertise. The deposition testimony reveals that the Bucyrus engineer actively participated in the day-to-day assembly process. In fact, it appears that Bucyrus retained some control over the process. David Elmore, a general superintendent with Taft and Taft's assembly supervisor, testified that near the end of the assembly process when S & H wished to walk the dragline from the assembly pad to the mining pit, the Bucyrus engineer "wouldn't sign off the machine because BE was still liable for the machine until the electrical work was completed." The dragline com-

ponent delivery schedule also indicates that assembly of the dragline was contemplated by and keyed to the sales contract. Bucyrus did not deliver all the parts of the machine at the same time. When S & H started work on January 15, 1985, many parts had not been delivered and parts continued to arrive through December 1985. Bucyrus delivered parts as they became necessary in the assembly process.

The shear size of the dragline is also indicative of the complexity of the assembly procedure. The 1300-W is immense; the boom is 285 feet long and the bucket has a forty-five yard capacity. The completed dragline weighs over 650 tons. Finally, the 1300-W erecction procedure — which was partially incorporated into the assembly contract — shows that assembly of the 1300-W required significant specialized expertise. Bucyrus notes in the assembly procedure that assembly takes approximately 62,000 man-hours to complete and requires a variety of skilled laborers including electricians, pipefitters and welders.

The majority's strategy is to show that the assembly was not part of a unitary interstate transaction by contending that assembly was not essential to the sale of a dragline. In support of its argument, the majority relies on two irrelevant arguments. First, the majority relies on the fact that Taft did not begin its search for a contractor to assemble the dragline until after it had signed the sales contract with Bucyrus. However, the majority's reliance on the timing of the two contracts as demonstrating that assembly is not part of a unitary transaction is fundamentally flawed as any negotiations with S & H would have been for naught if S & H did not have the expertise to assemble the dragline which Taft ultimately selected. Second, the majority argues that assembly was not essential to the sales contract because Taft could have assembled the dragline itself. This conclusion is contrary to the available deposition testimony. A. J. Taft, Jr. testified that Taft did not have sufficient manpower available to assemble the dragline. He also stated that certain aspects of the assembly work on the 1300-W were far more involved than that on the much smaller dragline which Taft had previously assembled. Additionally he noted that Taft had not assembled any dragline since 1979.

DISCUSSION

Application of Alabama's forum closing law in this case creates an impermissible burden on interstate commerce. The majority discusses a number of decisions in this area and concludes that two factors "consistently guide the courts' decisions." One is the interrelationship between the intrastate and interstate portions of the transactions. Another is the permanence of the relationship between the foreign corporation and the forum state.

A. The Reach of Interstate Commerce in Assembly Contracts.

The Supreme Court in three cases has considered the importance of the complexity of assembly in determining whether the assembly is an integral indispensable part of the sales contract. The *York Mfg. Co. v. Colley* case has already been discussed in part.[1]

In *York,* defendant Colley argued that the supervision of the assembly portion of the contract was separate and distinct from the delivery portion, and concluded, therefore, that since supervision was a wholly intrastate transaction, the plaintiff's suit was due to be dismissed for plaintiff's failure to qualify to do business in the state. The Texas court agreed, but the Supreme Court reversed. The Court concluded that assembly and testing would be "relevant and appropriate" to the interstate sale of such complex machinery, "unless it can be said that an agreement to direct the assembling and supervision of machinery whose intrinsic value depends upon its being united and made operative as a whole is not appropriate to its sale." *Id.* 38 S.Ct. at 432. Throughout the opinion, the Court emphasized the complexity of the endeavor and the fact that the purchaser bought an ice machine, not the parts of an ice machine.[2] The terms of the supervising engineer provision in

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[1]This case is also cited and discussed in the majority's opinion *supra* slip op. pp. 3975, 3976-3977, pp. ____, ____ - ____

[2]Taft purchased an unassembled dragline. However, it, like the ice machine, was of no use until it was assembled. Taft had to supply a location and mechanics to be supervised, but the contract with Bucyrus clearly contemplated that Bucyrus' obligation would not be discharged until after the dragline

the Bucyrus/Taft contract evidences a closer relationship between assembly and sale than did the arrangement in *York*.[3] The engineer from York Mfg. worked on a per diem basis which was paid by the purchaser, whereas here, the Bucyrus engineer's services were provided by Bucyrus as part of the sales contract.

In *Browning v. City of Waycross*, 233 U.S. 16, 34 S.Ct. 578, 579-80, 58 L.Ed. 828 (1914), the Court concluded that installation of lightning rods, sold in interstate commerce and installed locally by employees of the seller, was not in interstate commerce. The installation was a wholly intrastate affair and "bore no relevant or appropriate relation to interstate commerce." *York*, 38 S.Ct. at 431. In *York*, the Court distinguished *Waycross*, concluding that it "was not controlling as to a case where the service to be done in a state as the result of an interstate commerce sale was *essentially* connected with the subject-matter of the sale, that is, might be made to appropriately inhere in the duty of performance." *Id.* (emphasis added).

Finally, in *General Railway Signal Co. v. Virginia*, 246 U.S. 500, 38 S.Ct. 360, 62 L.Ed. 854 (1918), the State of Virginia contracted with General Railway to purchase and install automatic railway crossing signals at various locations in the state. General Railway manufactures many of the components

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was operational. The majority's observation that "entering into an erection contract . . . [was something] Taft did not have to do in order to utilize the machine," is simply not supportable by the record or common sense. It required over a year of work to get the machine operational so that Taft might "utilize" it. The dragline closely resembles the ice machine, "whose intrinsic value depends on its being united and made operative as a whole." *York*, 38 S.Ct. at 432.

[3]The majority notes: "Apparently, the [ice] machine was so complex that the engineer's services were required to assemble the machine properly." *Supra* slip op. p. 3977, p. ____ As I noted previously, assembly of the dragline was also extraordinarily complex, a conclusion which is supported by the fact that an engineer's services were required to assemble the machine and it took 275 working days to complete. In another part of the opinion, the majority relies on the 275 days as evidence of S & H's permanent presence in the state. *Supra* slip op. p. 3977, p. ____ Taken together, the majority's observations compel the incomprehensible conclusion that assembly may only be of only medium complexity to be in interstate commerce. Too easy and it is not essential, too hard and it indicates permanent presence.

required for installation; however, "to construct these signals as required by the contract it was necessary to employ in this state labor, skilled and unskilled, to dig ditches in which conduits for the wires are placed, to construct concrete foundations, and to paint completed structures." *Id.* The Court concluded that "the recited facts clearly show local business separate and distinct from interstate commerce." *Id.* The Court commented that this case was very similar to the lightning rods case. In *York,* the Court distinguished this case stating, "the work required to be done by the contract over and above its inherent and intrinsic relation to the subject matter of the interstate commerce contract involved the performance of duties over which the state had a right to exercise control because of their inherent intrastate character." 38 S.Ct. at 432.

These Supreme Court cases indicate that the fundamental question in construction or installation type cases is whether it is appropriate and essential for the seller/manufacturer to continue its involvement after delivery. It satisfies this standard if the subject matter of the sale is sufficiently complex, or if the seller's expertise is necessary to bring the item purchased into useful existence following delivery. With this synthesis in mind, assembly of the dragline was clearly essential to its sale and therefore was part of a unitary interstate transaction. Given the complexity of the assembly process in this case, the majority illogically concludes that assembly was an afterthought.

The majority attempts unsuccessfully to distinguish *York* from the instant case. The majority notes that "the [ice] machine was so complex that the [manufacturer/seller's] engineer's services were required to assemble the machine properly." Elsewhere the majority notes that "other companies, including an Alabama corporation and Taft itself, could have assembled the dragline." *Supra* slip op. p. 3978, pp. ____, ____ (Without any support from the evidence). These comments evidence the majority's misunderstanding of *York*. In that case, it is clear that the *purchaser* supplied the mechanics to assemble the ice machine. 34 S.Ct. at 431. The purchaser simply acted as both the general contractor and labor pool. However, the engineer from York Mfg. supervised the entire process. That the purchaser performed the assembly labor did not diminish the

complexity of the assembly process. The Court focused on whether the subject matter of the contract was sufficiently complex to render its assembly essential to its sale. It was the fact that assembly required the supervising engineer's expertise that influenced the court's decision. In the instant case, the purchaser instead hired S & H as a general contractor who in turn hired other workmen. This nuance does not alter the analysis. As in *York*, the engineer's expertise was required to complete assembly. There is nothing in the recoord that indicates Taft and Bucyrus considered S & H a replacement for the supervising engineer. In fact, the record supports the contrary conclusion which is that all parties to these contracts considered assembly of the dragline essential to its sale.

B. Establishing A Permanent Presence.

In *SAR Mfg. v. Dumas Bros. Mfg.*, 526 F.2d 1283 (5th Cir. 1976), the court concluded that the state's forum closing statute did not work an impermissible burden on interstate commerce when applied to the activities and transactions conducted by Sar in Alabama. Sar was engaged in the sale of polyurethane foam which it manufactured in plants located in Texas, Georgia and Mississippi. Sar leased a warehouse in Alabama to receive and store the foam for processing and subsequent sale to in-state concerns. Sar employed seven full or part-time employees at the warehouse and maintained two vehicles at the warehouse on a full-time basis. On appeal, the court concluded that subjecting Sar to the state's forum closing laws did not impermissibly burden interstate commerce.

The court relied on two Supreme Court cases[4] and concluded that Sar's intrastate foam sales were very much like Eli Lilly's intrastate drug sales. The court distinguished *Allenberg Cotton*, on the notion that under the facts in *SAR*, no nationwide mar-

[4] *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 95 S.Ct. 260, 42 L.Ed.2d 195 (1974) (intrastate contract between cotton farmer and out-of-state cotton merchant's in-state broker essential to interstate marketing mechanism and interstate aspect predominated); and *Eli Lilly & Co. v. Sav-On-Drugs*, 1386 U.S. 276, 81 S.Ct. 1316, 6 L.Ed.2d 288 (1961) (independent efforts at in-state marketing and distribution accomplished by Eli Lilly's in-state office, enough to break interstate commerce connection).

keting system would be impeded. 526 F.2d at 1285. The distinction drawn by the court turns on the connection between intrastate and interstate portions of the transaction. The issue is whether the intrastate portion has taken on an independent character of its own that separates it from the interstate portion. Stated differently, if the out-of-state entity has performed sufficient in-state acts to render the two aspects of the overall transaction distinct, then the entity is subject to the forum closing laws. One factor which the court found to be probative of this independent character is whether the out-of-state entity has set up a permanent in-state presence. However, the focus of the court's analysis remained whether the intrastate transaction is an essential element of a unitary interstate transaction.

The next case is *Diversacon Industries v. Nat'l Bank of Commerce,* 629 F.2d 1030, 1034-35 (5th Cir. 1980), where the plaintiff, a highway construction contractor, contracted to build a portion of interstate highway in Louisiana. Diversacon, a Florida corporation, set up its administrative support personnel in its parent company's Jackson, Mississippi office. One of Diversacon's subcontractors defaulted and the defendant Bank refused to honor its construction surety agreement because Diversacon had failed to qualify to do business in the state. The court of appeals concluded that "the scope of Diversacon's activities extended beyond the Mississippi border for the consummation of a definite interstate project," thus "it would be an impermissible burden on interstate commerce to give effect to denial of access through this qualification statute." *Id.* at 1034. The subcontract between Diversacon and the subcontractor did not lose its interstate character simply because the general contractor established a presence in the subcontractor's home state. The court noted that the Supreme "Court included in a federal definition of interstate commerce any activity of an intrastate nature which was an integral part of the overall interstate pattern or transaction." *Id.* at 1033. The court further observed that "the agreement upon which Diversacon is suing the Bank is clearly the single business transaction to which all of Diversacon's activities related — the construction of the Louisiana highway." *Id.* at 1034. This case is highly relevant to the present inquiry, where the out-of-state entity, S & H,

contracted with local workers to work on a project that is in interstate commerce. The record in this case shows that S & H has not established a presence in the state, any more permanent than was Diversacon's. Both S & H and Diversacon were present in the state for the sole purpose of completing a project which was in interstate commerce. The Diversacon court acknowledged the probative value of Diversacon's presence in the state, but remained focused on the work performed and whether it was part of a unitary interstate transaction.

Because I believe assembly of the 1300-W was an essential element of an interstate transaction and nothing under the facts of this case removes the transaction's interstate character, I would hold that application of Alabama's forum closing law effects an impermissible burden on interstate commerce. Since the majority has concluded otherwise, however, I respectfully DISSENT.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

S & H CONTRACTORS, INC.,	)	
Plaintiff;	)	
	)	No. CV
-vs.-	)	88-P-0468-S
A. J. TAFT COAL COMPANY, INC.	)	
Defendant.	)	

ORDER

In accordance with the accompanying Memorandum of Opinion, defendant's motion to dismiss, treated as a motion for summary judgment, is hereby GRANTED and this case is DISMISSED with prejudice. Costs are taxed against plaintiff.

This the 12th day of December, 1986.

/s/ Sam C. Pointer, Jr.
United States District Judge

MEMORANDUM OF OPINION

This matter is before the court on defendant's motion to dismiss, which will be treated as a motion for summary judgment.[1]

On May 23, 1984, A. J. Taft Coal Company, Inc. ("Taft") signed a contract to buy a 1300-W Bucyrus-Erie Walking Drag-

[1]Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, when matters outside the pleadings are presented to the court, the motion is to be treated as one for summary judgment. Both parties have presented matters outside the pleadings.

line ("Walking Dragline") from its manufacturer, the Bucyrus-Erie Company ("B-E"), a Delaware corporation. This contract contemplated that Taft would employ an erection contractor, but the contract did not state who that contractor would be. Ultimately, however, it was Taft's responsibility, among others, to "erect the machinery." Thereafter, on November 27, 1984, Taft entered into a contract with S & H Contractors, Inc. ("S & H"), a Kentucky corporation, wherein S & H agreed to erect the Walking Dragline in compliance with the terms of the Taft/B-E contract, and to perform all of the obligations of Taft as it involved the erection and testing of the Walking Dragline.

On March 12, 1986, S & H filed this action alleging, among other things, that it had substantially performed its obligations under the contract, but that Taft had not, and it demanded damages from Taft for breach, or for the unpaid reasonable value of work performed.

In its motion to dismiss, Taft argues that S & H conducted activities which constituted "doing business" in Alabama without qualifying to do business in Alabama until after this dispute arose. As a result, Taft argues, S & H is precluded, as a matter of law, from enforcing the contract under Article XII, § 232 of the Alabama Constitution of 1901. S & H does not dispute its failure to timely qualify, but argues that its activities within Alabama were necessary and incidental to the interstate sale of the Walking Dragline.

Section 232 of the Alabama Constitution, along with § 10-2A-247 and § 40-14-4 of the *Alabama Code* (1975), bar a foreign corporation not qualified to do business in Alabama from enforcing its contracts in the courts of Alabama. *Wallace Construction Company, Inc. v. Industrial Boiler Company, Inc.*, 470 So.2d 1151 (Ala. 1985). These laws apply, however, only when the business conducted in Alabama by the non-qualified corporation is intrastate in nature. *Id.* at 11152; *Johnson v. MPL Leasing Corp.*, 441 So.2d 904 (Ala. 1983). S & H is correct, therefore, in its contention that a non-qualified foreign corporation is not barred from enforcing its contracts in Alabama when its activities in Alabama are incidental to the transaction of interstate business. *Wallace Construction*, 470 So.2d at 1151; *Allenberg Cotton Company, Inc. v. Pittman*,

419 U.S. 20 (1974); *York Mfg. Co. v. Colley,* 147 U.S. 21 (1918); Article I, § 8, cl. 3, United States Constitution.[2]

This rule does not apply to the facts in this case, however. The crucial fact which distinguishes this action following the above-mentioned rule is that S & H was not a party or a "middle-man" to the interstate sales transaction as were the non-qualified foreign corporations in *Wallace Construction,* 470 So.2d 1151 (Ala. 1985); *Allenberg Cotton Company, Inc. v. Pittman,* 419 U.S. 20 (1974) (plaintiff was a middle-man in an interstate transaction); *Shook & Fletcher Insulation Co. v. Panel Systems, Inc.,* 784 F.2d 1566 (11th Cir. 1986) ("Panel Systems, Inc.'s primary duty under its contract with Shook and Fletcher was to sell and deliver materials into Alabama."); *In re Delta Molded Products, Inc.,* 416 F.Supp. 938 (N.D. Ala, 1976), *affirmed,* 571 F.2d 957 (5th Cir. 1978); *York Mfg. Co. v. Colley,* 247 U.S. 21 (1918); and *Puffer Mfg. Co. v. Kelley,* 198 Ala. 131, 73 So. 403 (1916). In fact, it was not until five months later that Taft hired S & H as the erection contractor.[3]

To the contrary, this case involves a contract for the performance of construction activities, the erection of the Walking Dragline at Taft's mining operations in Alabama. As such, this case is controlled by the line of Alabama cases which

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[2]S & H has argued that this bar does not apply because the contract was formed outside Alabama. While it is true that sections 10-2A-247 and 40-14-4, *Ala. Code* (1975) do not apply to contracts formed outside the State of Alabama, Section 232 of the Alabama Constitution has been held to create a policy rule which bars a non-qualified foreign corporation from enforcing its contracts in the state, even if the contract was formed outside of the state, if the contract involves "doing substantial business in Alabama." *Shook & Fletcher v. Panel Systems, Inc.,* 784 F.2d 1566 (11th Cir. 1986); *Sanjay, Inc. v. Duncan Construction Co., Inc.,* 445 So.2d 876 (Ala. 1983). Therefore, although there may be a factual dispute as to where the contract was formed, the "door-closing statute" still applies in the above-mentioned form.

[3]S & H argues that no entity could be found in Alabama with the required expertise to perform this work, so as to require an "interstate transaction" wherein S & H performed the work. Taft has shown, however, that there was an Alabama corporation recommended by the manufacturer which submitted a proposal for the erection of the Walking Dragline and that Taft also considered assembling the machine itself. The fact that Taft ultimately chose S & H, or that Taft considered S & H the "best" candidate for the job, cannot change the fact that there were other in-state entities who could perform the work.

state that construction activities are particularly "intrastate" in character. *Sanjay, Inc. v. Duncan Construction Company, Inc.*, 445 So.2d 876 (Ala. 1983); *Kentucky Galvanizing Co., Inc. v. Continental Gas Co., Inc.*, 335 So.2d 649 (Ala. 1976); *Computaflor Co. v. N. L. Blaum Construction Co.*, 289 Ala. 65, 265 So.2d 850 (1972).[4]

As a result, this court must hold that S & H, through its construction activities, was "doing substantial business in Alabama," *Shook and Fletcher*, 784 F.2d at 1570, and that S&H's suit is not saved by the "interstate business" exception to Alabama's "failure-to-qualify" rule. *Sunjay, Inc.*, 445 So.2d at 881. Accordingly, this action is dismissed. A separate Order will be entered to this effect.

This the 12th day of December, 1986.

/s/ Sam C. Pointer, Jr.
United States District Judge

[4]Further, S & H cannot argue that it somehow "stood in the shoes" of the manufacturer when it specifically assumed the erection responsibility of Taft, the in-state purchaser.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

A. J. TAFT COAL COMPANY, INC.,	)	
Plaintiff,	)	CIVIL ACTION
v.	)	1:88-cv-436-MHS
S & H CONTRACTORS, INC.,	)	
Defendant.	)	

ORDER

This case involves a contract dispute between A. J. Taft Coal Co., Inc. ("Taft"), an Alabama corporation, and S&H Contractors, Inc. ("S&H"), a Kentucky corporation. Presently before the Court are plaintiff Taft's motion for summary judgment and defendant S&H's motion for judgment on the pleadings. For the reasons stated below, the Court will grant plaintiff's motion for summary judgment, finding that the contract is void and therefore that there is no valid arbitration clause. The Court will enjoin the arbitration scheduled in Atlanta and will deny defendant's motion for judgment on the pleadings.

A. *Background*

The dispute centers around a contract entered into by Taft and S&H in November 1984 for S&H's erection of a dragline (a piece of mining equipment) for a Taft mine in Alabama. Disputes arose between the parties during performance of that erection contract, and on March 12, 1986, S&H filed an action seeking damages against Taft in federal district court in Alabama. Five weeks earlier, more than fourteen months after entering into the contract, S&H had qualified to do business in Alabama by filing the appropriate papers with the Alabama Secretary of State.

On November 14, 1986, S&H filed a demand for arbitration by the American Arbitration Association ("AAA"), requesting Birmingham, Alabama, as the arbitration site. On December 12, 1986, the federal district court dismissed S&H's breach of contract complaint against Taft, granting summary judgment in Taft's favor on the grounds that S&H had failed to qualify to do business in Alabama under that state's business qualification laws. S&H's subsequent appeal to the Eleventh Circuit Court of Appeals was stayed pending the outcome of arbitration.

In February 1987 Taft filed suit to enjoin arbitration, and in April 1987 the federal district court did enjoin arbitration, but only in Alabama. The AAA then granted S&H's petition to change the arbitration hearing site to Atlanta, Georgia. In March 1987 Taft filed the present case.

The main issues presented to the Court in this case are 1) whether the contract between Taft and S&H is void and unenforceable by courts outside Alabama in an action brought by the resident corporation, and 2) whether S&H may alternatively have its contract dispute resolved by arbitration. The Court finds the contract to be void and unenforceable whether by courts within or outside Alabama. This finding precludes arbitration because the contract's arbitration clause is not severable from the rest of the contract. Therefore, the Court will enjoin arbitration between Taft and S&H.

B. *Governing Law*

The statutory basis for governance of the contract between Taft and S&H is found in Section 10-2A-247 (a) of the Code of Alabama (1984), which provides in pertinent part:

> All contracts or agreements made or entered into in this state by foreign corporations which have not obtained a certificate of authority to transact business in this state shall be held void at the action of such foreign corporation or any person claiming through or under such foreign corporation by virtue of said void contract or agreement; but nothing in this section shall abrogate the equitable rule that he who seeks equity must do equity.

Strictly speaking, the voiding of an unqualified foreign corporation's contract and bar on enforcement of such a contract

in Alabama courts apply only to contracts made in the state. However, Alabama case law has found in the state constitution a public policy that also renders unenforceable contracts made outside Alabama but performed in Alabama. Article XII, Section 232 of the Alabama Constitution provides in pertinent part:

> No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein and without filing with the secretary of state a certified copy of its articles of incorporation or association.

See Sea Scaping Construction Co. v. McAtee, 402 So.2d 919, 921 (Ala. 1981) (despite the acknowledged severity of this principle, the court upheld "'the public policy clearly written into our law in order that foreign corporations may be subject to the process of our courts'") (citation omitted).

C. *Taft as Plaintiff*

Questions about this contract's voidness and unenforceability are not raised directly by this case because S&H is not seeking contract enforcement in this action in the Northern District of Georgia. Instead, Taft is seeking to avoid arbitration on a voidable contract. The question for the Court is whether Taft may avoid the contract; the Court's answer is yes. Treating the contract as void occurs in Alabama when the unqualified foreign corporation brings an action to enforce it, as in S&H's action that was dismissed by the United States District Court in the Northern District of Alabama. As one commentator has observed, "In essence, the [Alabama] statute allows the contract to be voidable at the will of the resident party. Thus, while the resident party retains all benefits already received under the agreement, the foreign corporation is left without an avenue to enforce mutual performance." Note, Sanjay, Inc. v. Duncan Construction Co.: *Alabama Refuses Equity's Knock and Closes Another Door on Unqualified Foreign Corporations*, 35 Ala. L. Rev. 715, 720 (1985). And, the commentator added, "[t]he 'voidable at will' provision raised the question of whether the statute actually voids the contract. The statute appears merely to make contracts unenforceable by the foreign corporation."

Id. at 720 n.36. Regardless of how skeptically the Court may regard the underlying rationale and possible commerce-restricting effects of Alabama's approach to qualification of foreign corporations, the fine points of Alabama law are not for the Court to resolve. *See Aim Leasing Corp. v. Helicopter Medical Evacuation, Inc.* 687 F.2d 354, 357 (11th Cir. 1982); *Foxco Industries, Ltd. v. Fabric World Inc.*, 595 F.2d 976, 980 (5th Cir. 1979).

D. *Discussion*

In the present case there is some dispute as to where the contract was made, but according to Alabama law the contract is void regardless of where it was made. If the contract was made in Alabama it is void on its face under Section 10-2A-247 (a) of the Alabama Code because S&H had not qualified to do business in Alabama. If the contract was not made in Alabama but S&H's performance of the contract constituted doing substantial business in Alabama, then the contract is void under the Alabama courts' interpretation of Article XII, Section 232 of the Alabama Constitution.

In *Sanjay, Inc. v. Duncan Construction Co., Inc.* 445 So.2d 876 (Ala. 1983), an unqualified foreign corporation performed construction activities in Alabama, as S&H did in this case. The Court in *Sanjay* found the contract to be unenforceable under the Alabama Constitution regardless of where it was made. The Eleventh Circuit agreed that "under Alabama law, contracts made by foreign corporations outside Alabama involving substantial business within Alabama are void, when such corporations have failed to qualify to do business in Alabama." *Shook & Fletcher Insulation Co. v. Panel Systems, Inc.*, 784 F.2d 1566, 1570 (11th Cir. 1986).

Judge Pointer, in granting summary judgment in the case brought by S&H in Alabama, found that S&H was doing substantial business in Alabama and therefore that their claim was "not saved by the 'interstate business' exception to Alabama's 'failure to qualify' rule." Memorandum of Opinion at 4. The Court agrees with Judge Pointer's conclusions and finds that, even if the contract was not made in Alabama, S&H was doing substantial business in Alabama and therefore that

the contract is void.

As further interpreted by the courts, Alabama law decrees that a foreign corporation that is not qualified in Alabama when it begins performance of a contract cannot enforce the contract in Alabama courts or in a diversity action in federal courts. *Foxco Industries,* 595 F.2d at 980 ("A foreign corporation barred from suit in Alabama state court because of its failure to qualify to do business is similarly barred from bringing its claim in a diversity action in federal district court."). In a diversity action between a Delaware corporation and a Louisiana corporation doing business in Alabama, the Eleventh Circuit held that "[t]he bar created by Alabama's qualification statutes comprises 'substantive' state law that we must apply in diversity suits in federal courts." *Aim Leasing,* 687 F.2d at 357 (citations omitted).

S&H's subsequent qualification to do business, more than fourteen months after it entered into the contract, did not cure its failure to meet Alabama qualification standards. Nor did it leave S&H in such a position that equitable estoppel could be applied as a remedy.

For a foreign corporation that has qualified to do business in Alabama *after* executing a contract, to allow that corporation to bring an action for contract enforcement would in effect nullify Alabama's law and would circumvent the law's public policy concerns. The court in *Sanjay* faced precisely this dilemma. In ruling against the foreign corporation seeking contract enforcement, the court distinguished *Sanjay* from the rare situation in which subsequent qualification does cure a foreign corporation's failure to timely qualify. *Sanjay,* 445 So.2d at 879-80. Those same distinctions apply in the present case.

In *Sanjay,* Sanjay, Inc., was not qualified to do business in Alabama at the time it entered into contract with Duncan Construction Co. Sanjay became qualified to do business more than eight months after it signed the contract and began work, about five months before the contract dispute arose. In the present case, more than fourteen months elapsed between the time S&H and Taft entered into the contract and S&H began work and when S&H qualified to do business in Alabama. S&H's qualification occurred a scant five weeks before it filed a breach

of contract claim against Taft.

Both Sanjay and S&H sought to persuade the Court by way of *Day v. Ray E. Friedman & Co.*, 395 So.2d 54 (Ala. 1981), that their late qualification cured their earlier failure, but the court in *Sanjay* found, and the Court here finds, *Day* to be inapposite. In *Day*, a commodities broke entered into an employment contract before qualifying to do business in Alabama, then qualified to do business, and after that signed a promissory note with an employee. The facts in *Day* are distinguishable from those in both *Sanjay* and the present case. Here plaintiff is suing on the original contract, not on a note signed after it qualified to do business. The court in *Sanjay* also distinguished *Day* on its facts:

> We must admit that there is language in *Day* . . . which would suggest that a foreign corporation which qualified to do business in this state during the performance of a contract is entitled to recover on the contract, but *Day* should be carefully read in view of the particular facts of that case.

Sanjay, 445 So.2d at 880. Thus, as one commentator has noted, "the [Alabama] supreme court's interpretation of the statute forecloses the corporation's option to rectify the situation by qualifying after it has entered into the contract with the resident party." Note, *supra* at 720.[1]

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[1]A 1916 case provides a narrow exception to this rule, but it is also narrowly applied, and it was neither asserted nor is it applicable in the present case. That case is *Montgomery Traction Co. v. Montgomery Light & Water Power Co.*, 229 F.2d 672 (5th Cir. 1916), *cert. denied*, 242 U.S. 628 (1916), where subsequent qualification, coupled with continuing recognition of the contract (in the form of dealings between the parties) after that qualification, constituted a readoption of the language of the otherwise void contract.

Another exception might have applied had the time elapsing between S&H's doing business in Alabama and its qualification been less. The Fifth Circuit held in a 1972 case that "the slight delays in qualification by [the foreign corporation] did not operate to render void or voidable the lease contract which was valid in its inception." *Lee v. Great Northern Nekoosa Corp.* 465 F.2d 1132, 1135 (5th Cir. 1972). In *Lee*, the successor to a foreign corporation that entered into a lease in April 1961 qualified to do business in Alabama in July 1963; suit was not filed against the successor corporation until September 1970, more than seven years after the corporation's qualification. *Id.* at 1133-34. The proportionately brief time during which the successor corporation did business in Alabama without qualifying and

Numerous cases have wrestled with the applicability of the equity exception articulated in Alabama Code Section 10-2A-247 (a), and the Court has considered it here. The Code states in pertinent part: "[N]othing in this section shall abrogate the equitable rule that he who seeks equity must do equity." In *Sanjay,* Chief Justice Torbert argued in dissent that the public policy reasons for Alabama's qualification requirements are satisfied by a foreign corporation's *subsequent* (post-contract) qualification to do business. *Sanjay,* 445 So.2d at 882. Justice Torbert cited the elements of equitable estoppel (an actor communicates something in a misleading way, by words, conduct, or silence; another relies on that communication; the other would be harmed materially if the actor is later permitted to assert any claim inconsistent with his earlier conduct, *Baker v. Hospital Corp. of America,* 432 So.2d 1281, 1295 (Ala. 1983)) and, like the plaintiff in *Sanjay,* cited *Day v. Friedman* to support his argument. However, as discussed above, the majority in *Sanjay* distinguished the facts in *Day.* Those same distinctions apply in the present case.

In addition, in the present case S&H presented no evidence and asserted no claim that Taft had engaged in any misleading conduct regarding the requirement that S&H qualify to do business in Alabama before entering into a contract. It is not the responsibility of a resident Alabama corporation to inform foreign corporations of Alabama's qualification requirements. It is the responsibility of corporations doing business in states other than where they are incorporated to survey those states' requirements before embarking on business enterprises in those states. Justice Torbert's plea in *Sanjay* that " 'a party who accepts the benefits of a contract should not be allowed to escape the burdens,' " *id.* at 884 (citation omitted), can be read in the present case as applying to the party seeking contract enforcement (S&H) rather than to the party seeking to avoid the contract (Taft).

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the long stretch of time that passed before suit was filed against the corporation convinced the Court that "the lease contract had been valid from its inception." *Id.* at 1135. The *Lee* Court could, considering the larger scheme of things, characterized the successor foreign corporation's delay as "slight"; that same characterization does not describe the present case.

Dismissing "this so-called equity exception," the majority in *Sanjay* concluded, "[A]ny way you slice it, the action in this suit was *ex contractu." Id.* at 879. The Court's interest in an equitable outcome cannot overcome S&H's leisurely attempt to correct its failure to meet Alabama's doing-business requirement.

E. *Pending Arbitration*

The unenforceability of the contract extends to the contract's arbitration clause, so there exists no enforceable agreement between the parties to arbitrate disputes. "[T]he question of arbitrability is an issue for judicial determination . . ." *Roadway Express, Inc. v. Teamsters Local 515,* 642 F.Supp. 116, 118 (N.D. Ga. 1986) (citations omitted). In any case, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior and Gulf Navigation Co.,* 363 U.S. 574, 582 (1960).[2] Clearly, if a party cannot be forced to arbitrate if the contract does not contain a valid arbitration clause, then a party cannot be forced to arbitrate if the contract containing the arbitration clause, which gives the arbitration clause viability, is found to be void.

In sum, the Court concludes that the contract between Taft and S&H is void and unenforceable and that arbitration is not an alternative avenue of dispute resolution for S&H. Therefore, plaintiff's motion for summary judgment is GRANTED, and the pending arbitration is ENJOINED. Defendant's motion for judgment on the pleadings is DENIED.

IT IS SO ORDERED, this 3rd day of October, 1988.

/s/ Marvin H. Shoob, Judge
United States District Court
Northern District of Georgia

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[2]Only extra work claims were covered in the parties' arbitration clause to begin with, so what is at stake here is not arbitration of the entire contract dispute but only a small part of the actual dispute.

APPENDIX D

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between	)	
S & H CONTRACTORS, INC.	)	DECISION OF
- AND -	)	ARBITRATORS
A. J. TAFT COAL COMPANY, INC.	)	
CASE NUMBER: 30 110 0166 86	)	

AFTER REVIEWING THE PARTIES' CONTENTIONS REGARDING THE AMENDED DEMAND AND SUBSEQUENT ISSUES, WE, THE PANEL, MAKE THE FOLLOWING RULING:

I. *SET OFF*

A. J. Taft Coal Co., Inc. (hereinafter Taft) files the claim of Set-Off for $106,000.00 as liquidated damages. In their response, S & H Contractors, Inc. (hereinafter S & H) has generally denied Taft's claim for Set-Off, but has not filed any motion denying Taft's right to file the Set-Off nor has S & H as an affirmative defense denied on some particular basis that Taft has the right to file a Set-Off. For this reason, we would rule that Taft's claim for Set-Off is timely filed and that the evidence thereon should be considered by the Arbitration panel.

II. *WAIVER*

Taft claims that S & H has waived its right to arbitration by (1) filing suit and (2) not giving the contractually required 10 days written notice of the intent to arbitrate. Unless Taft could show some prejudice incurred by it because of S & H's presumed failure to give the 10 day written notice, we would rule that the claim of S & H has not been waived on this basis. Second, the filing of the law suit in the Federal District Court in the Northern District of Alabama does not preclude a subsequent filing for arbitration. The Federal Court ruled that S & H could not enforce its contract in the courts of Alabama

because S & H failed to qualify to do business in Alabama. Taft had argued that the arbitration could not be conducted pursuant to a *void* contract. The Federal Court responded that it had not ruled that the contract was void for all purposes, merely that the contract could not be enforced in the courts of Alabama. Moreover, the court in a footnote, specifically stated that other arguments concerning the arbitrability of any alleged breach of contract "should be raised with the arbitration panel". Thus, it seems to be that the Court has foreseen that this matter would proceed to arbitration.

III. *BREACH OF CONTRACT*

This is merely an affirmative defense and the burden of proof is on Taft.

IV. *BAR TO ARBITRATION*

Taft argues that S & H is attempting to "subvert" the Federal District Court's order that the contract is unenforceable in Alabama by changing the site of arbitration to Atlanta, Georgia. Further, Taft argues that the AAA rules bind the parties to arbitrate in Birmingham. It is obviously in the interest of S & H to move the site of the arbitration to Atlanta from Birmingham, since S & H cannot have arbitration within the boundaries of the State of Alabama. We do not believe it assist us in any way to argue that this "subverts" the court's order. By the same token, it could be asserted that Taft's seeking to deny arbitration in any other venue, while knowing that arbitration cannot be compelled in Alabama, "subverts" S & H right to arbitration, which was contractually agreed to by Taft. According to our understanding, the Court stated that if S & H were allowed to proceed to Arbitration in Alabama, then it could ask the United States District Court to enforce an arbitration award pursuant to the Federal Arbitration Act, 9 U.S.C. 9. Thus, in no-way has the United States District Court precluded the enforceability of the contract, nor its Arbitration provision, in any other jurisdiction.

V. *LIMITATION ON ARBITRATION*

This argument goes to the merits of the dispute with particular regard to the contract limitations. Thus, this is an

affirmative defense and remains to be arbitrated.

VI. *NEW PROCEDURE*

Taft seeks to have a new panel of arbitrators from which to select, and that the arbitration process should start over. Significantly, Taft assert no grounds for this request. We see no reason for a new panel of arbitrators to be selected since there has been no evidence, nor even any assertion, that the present panel has in anyway evidenced partiality or corruption, have been guilty of any misconduct or have exceeded their powers. In our opinion it would be a waste of time to start the process over and would certainly result in a duplication of effort.

In their response, S & H has requested a hearing on the "preliminary issues and objections raised by Taft." We can find no request for a preliminary hearing or for oral argument by Taft on any issues. Since we would rule *against* Taft on the arbitrability of the dispute and on the site of the arbitration, and since we would rule *for* Taft on the matter of asserting their counterclaim for Set-Off, we see no need for a preliminary hearing on these particular matters. If the parties, would like to submit written briefs concerning these issues, we would be happy to review them. On the other hand, this is not to say that we would deny a preliminary hearing on other matters that would expedite the hearing process, such as narrowing the issues, evidentiary disputes and witness disclosure.

/s/ G. Wayne Ashbee, Arbitrator
9/17/87
William S. Fishburne, III, Arbitrator
9/19/87
David E. Pearson, Arbitrator
9/23/87